APPEAL FROM APPELLATE DECREE NO.403 OF 1985

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Against the judgment and decree dated 17th July, 1985 passed by Shri A.N.K.N. Sinha, District Judge, Saran, Chapra in Money Appeal No.03 of 1984 reversing the judgment and decree dated 23rd February, 1984 passed by Shri S.K. Sinha, Subordinate Judge-2, Chapra in Money Suit No.17 of 1983. .

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Krishna Prasad & Anr. : Appellants

V e r s u s

Kedar Prasad : Respondent

For the appellants : Mr. K.K. Ghose, Advocate.

For the respondent : M/s D. Kr. Singh and
Jitendra Kr. Pandey, Advocates.

P R E S E N T

HON'BLE MR. JUSTICE S. N. HUSSAIN

Learned counsel for the appellants were heard at length on 26.08.2008. Today (01.09.2008) learned counsel for respondent nos. 2 and 3 also argued at length.

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2. This second appeal has been filed by the plaintiffs-respondents-appellants challenging the judgment and decree of the learned court of appeal below.

3. The matter arises out of Title (Mortgage) Suit No. 81 of 1981 for recovery of a sum of Rs.6,720.00 from the defendants-appellants-respondents detailed in Schedule-I of the plaint on the basis of two mortgage deeds dated 24.01.1980 executed by defendant no.1 in favour of the plaintiffs for a period of seven years with stipulation of conditional sale of the mortgage land detailed in Schedule-II of the plaint.

4. Subsequently on the petition of the plaintiffs, the said suit was converted to Money Suit No. 17 of 1983 and on the basis of pleadings of the parties the learned trial court formulated following issues for deciding the suit:

(i) Is the suit as framed maintainable?

(ii) Have the plaintiffs got any valid cause of action for the suit?

(iii) Is the suit hit by section 4, 5 and 7 of Bihar Lenders (Regulation of Transaction) Act, 1974?

(iv) Are the conditional sale deeds in favour of the plaintiffs without consideration as alleged by the defendants?

(v) Are the plaintiffs entitled to get a decree for the consideration money and interest as claimed by them?

(vi) Is the claim of the plaintiffs correct?

(vii) To what other relief, if any, the plaintiffs are entitled?

5. On the basis of aforesaid issues, evidence were led and arguments were made by the respective parties whereafter the learned 2nd Subordinate Judge, Chapra, decreed the suit on contest with cost against defendant nos.2 and 3 vide judgment and decree dated 23.02.1984 after arriving at the following findings:

(a) Since the suit was filed within a period of three years from the date of execution of sale deeds in question, the suit is not hit by the Law of Limitation.

(b) In course of his arguments learned counsel for the defendants submitted that they do not want to press the issue that the suit was hit by section 4, 5 and 7 of the Bihar Money Lenders(Regulation of Transaction) Act, 1974.

(c) According to learned counsel for the defendants the only point for determination in the suit was whether decree for recovery of amount in question can be passed against defendant nos. 2 and 3 or against defendant no.1 and thus the scope of the suit has been narrowed down.

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(d) The contention of learned counsel for the plaintiffs finds support from the case reported in A.I.R. 1970 SC 504 as cited by learned counsel for defendant nos.2 and 3 because the two sale deeds-Exts.1 and 1/A is found to have mentioned about the amount in question which was kept in Amanat for making payment to the plaintiffs.

(e) The plaintiffs are entitled to recover the amount from defendant nos. 2 and 3.

(f) The plaintiffs are entitled to get a decree for the amount as well as for the interest as claimed by them.

(g) The plaintiffs have cause of action for the suit which is maintainable and there is no defect in the frame of the suit.

6. Against the aforesaid judgment and decree of the learned trial court, defendant nos.2 and 3 filed Money Appeal No. 03 of 1984 and on the basis of the pleadings of the parties to the appeal, the following points were formulated for deciding the appeal by the learned court of appeal below:

(i) Whether there was any privity of contract between the plaintiffs and defendant nos. 2 and 3 so far the execution of sale deeds Exts.1 and 1/A is concerned, which were executed by defendant no.1 in favour of defendant no.2 with respect to the suit property?

(ii) Whether the plaintiffs being strangers to the contract of sale between defendant no.1 and defendant no.2 were entitled to receive any benefit from such a contract and could sue defendant nos.2 and 3 for the recovery of mortgage money?

(iii) Whether in view of mortgage deeds dated 24.01.1980 executed by defendant no.1 in favour of plaintiffs with respect to the suit property, the plaintiffs could at best be held entitled to a decree against defendant no.1 alone?

7. On the basis of aforesaid issues, arguments on behalf of parties were heard in the title appeal whereafter vide judgment and decree dated 17.07.1985 the learned District Judge, Saran allowed the title appeal on contest with cost, set aside the judgment and decree of the learned trial court and dismissed the suit after arriving at the following findings:

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(a) There is no dispute that defendant no.1 had executed two mortgage deeds for a sum of Rs.4,500.00 each on 24.01.1980 in favour of the plaintiffs.

(b) It is also not in dispute that defendant no.1 executed two registered sale deeds dated 11.11.1980(Ext. 1 and 1/A) in favour of defendant no.2 who is the wife of defendant no.3 with respect to the same property, which was earlier mortgaged to the plaintiffs.

(c) It is not in dispute that the amount of Rs.6,000.00 was kept in Amanat under the two sale deeds aforesaid by the vendee, namely, defendant no.2 for discharging the prior mortgage debt of the vendor in favour of the plaintiffs.

(d) The question is whether the plaintiffs in the aforesaid admitted circumstances are entitled to recover the amount of Rs.6,000.00 with interest as claimed from defendant nos. 2 and 3 or they are entitled to recover the same from defendant no.1.

(e) The law is well settled that a stranger to a contract cannot secure the benefit of a contract to which he is not a party, but the case will certainly be different, if, as a result of contract between the two parties a trust comes into existences for the benefit of a third person, but this observation can hardly be of assistances to the plaintiffs.

(f) The plaintiffs are not entitled to recover any amount from defendant nos.1 and 2 on the basis of the stipulation made in the sale deeds-Exts.1 and 1/A.

(g) The finding of the learned court below that the suit of the plaintiffs is not hit by section 4 and 7 of the Bihar Money Lenders(Regulation of Transaction) Act, 1974 cannot be interfered with.

(h) No cause of action is available to the plaintiffs even against defendant no.1 and the plaintiffs cannot be held entitled to a decree in respect of the amount claimed against defendant no.1 also.

8. Against the aforesaid judgment and decree of the learned court of appeal below the plaintiffs filed the instant second appeal on 27.09.1985 whereafter it was admitted on 01.12.1987 and following substantial questions of law were formulated :

(i) Whether the decision in the case of M.C. Chacko Vrs. The State Bank of Travancore reported in A.I.R. 1970 SC 504 is applicable to the facts and circumstances of this case?

(ii) Whether the covenant to pay the mortgage amount runs with the land mortgaged and, as such, whether the purchaser of equity of redemption was responsible for the payment of the mortgage amount?

(iii) Whether the suit could be decreed as against defendant no.1, the original mortgager, in case it is held that the purchaser of equity of redemption is not liable to pay the mortgage amount?

9. Learned counsel for the appellants contended that the learned trial court has considered the entire matter in detail and rightly arrived at the findings which would be clear from the judgment of the learned trial court itself but the learned court of appeal below without considering the said findings and the materials on which the said findings were arrived at, set aside the judgment and decree of the trial court merely on the basis of a decision of the Hon'ble Supreme Court in the case of **M.C.Chacko (supra)** although the said decision was not applicable to the facts and circumstances of the instant case.

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10. On the other hand, learned counsel for respondent nos. 2 and 3 specifically stated that respondent no.1, Kedar Prasad, who was the executant of the mortgage deeds in favour of the plaintiffs and was also the executant of the sale deeds in favour of defendant no. 2 had died during the pendency of the instant second appeal but the appellants having not substituted his heirs, the instant second appeal has abated. The second objection raised by the learned counsel for respondent nos. 2 and 3 is with respect to privity of contract between defendant no.1 and defendant nos.2 and 3 so far the sale deeds in question are concerned and according to him the plaintiffs not being a party to the contract cannot sue on its basis.

11. So far as the first question raised by learned counsel for respondent nos. 2 and 3 is concerned, it is quite apparent from the admitted facts that respondent no.1 has already

sold his entire right, title and interest in the suit premises in favour of defendant nos. 2 and 3 and the learned trial court has clearly held that the plaintiffs are entitled to recover the amount as claimed by them from defendant nos. 2 and 3 only and the said defendant nos. 2 and 3 are respondent nos. 2 and 3 in the instant second appeal. Furthermore, the entire interest of respondent no.1 has already been admittedly devolved upon respondent nos. 2 and 3 and their sale deed itself shows that the liability of paying the dues of the plaintiffs has also been shifted to respondent nos. 2 and 3. In the said circumstances due to the death of respondent no.1 and non-substitution of his heirs, the appeal cannot legally abate, specially in the presence of respondent nos. 2 and 3.

12. So far as the claim of the parties with respect to decision of Hon'ble the Apex Court in the case of **M.C.Chacko (supra)** is concerned, the said case law relied upon by the learned court of appeal below was with respect to the liabilities as per the mortgage and it was declared in the said decision that the petitioner of that case was not personally liable for the debt due under letter of guarantee executed by its executants nor the property allotted to the petitioner under the deed in question was liable to satisfy the debt due to Kottayan Bank under the letter of guarantee. But this is not the matter in issue in the instant case as the plaintiffs' claim is with respect to rights and liabilities of the buyer as enshrined in sub-section 5(b) of Section 55 of the Transfer of Property Act, 1882 in which it has been prescribed that the buyer is bound to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from encumbrances , the buyer may retain out of the purchase-money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto.

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13. The learned court of appeal below completely over looked the aforesaid provision of law and did not even properly consider the decision of the Hon'ble Apex Court in the case of **M.C.Chacko** (Supra) in which it was specifically held that for creating a charge on immovable property, no particular form of words is needed: by adequate words intention may be expressed to make property or a fund belonging to a person charged for payment of a debt mentioned in the deed. But in order that a charge may be created, there must be evidence of intention disclosed by the deed that a specified property or fund belonging to a person was intended to be made liable to satisfy the debt due by him. In the instant case the sale deed

sufficient contained adequate words by which intention was expressed by its executant making the property charged for payment of debts to the plaintiffs. Furthermore the said debt not being in dispute, the plaintiffs were quite justified in suing defendant nos. 2 and 3 (respondent nos. 2 and 3) for payment of the said money.

14. Admittedly an obligation had been created over the suit land by the mortgage deeds against defendant no.1 in favour of the plaintiffs, which obligation was transferred by defendant no.1 to defendant no.2 by the sale deeds in question, which was clearly included in the terms of sale. In the instant case, the execution of mortgage deeds dated 24.01.1980 by defendant no.1 in favour of the plaintiffs is admitted and the execution of registered deeds dated 11.11.1980 by defendant no.1 in favour of defendant no.2 is also admitted. It is further admitted that the amount of Rs.6,000.00 was kept in Amanat as per the two sale deeds mentioned above for defendant no.2 to discharge the prior debt in favour of the plaintiffs. In the said circumstances, there is no dispute that the said Amanat was an encumbrance on the property existing at the date of aforesaid sales and hence according to the aforesaid provision of the Transfer of Property Act, the buyer defendant no.2 and her husband defendant no.3 were liable to pay the said amount, so retained, to the plaintiffs, who were clearly entitled thereto.

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15. No doubt, plaintiffs were not parties to the sale deeds executed by defendant no.1 in favour of defendant no.2 but they are not challenging any of the terms of the sale deed, rather they are merely claiming the charge on the property, which was the subject matter of the sale deeds executed by defendant no.1 in favour of defendant no.2, specially when the said charge on the property was never in dispute and the defendants never claimed that the said money was not due. Hence, the covenant to pay the mortgage amount ran with the land in question and as such the purchaser of equity was fully responsible for the payment of the aforesaid amount due. It is thus quite apparent that it was the duty of defendant nos. 2 and 3 to pay the amount kept in Amanat according to their own sale deeds with interest to the plaintiffs. The aforesaid aspect of the matter was completely ignored by the learned court of appeal below, which did not appreciate the tenor and spirit of the specific provisions of law and the case laws and decided the matter without even realising the basis on which the learned trial court had arrived at the definite findings.

16. Considering the entire facts and materials of the case, this Court finds that the learned court of appeal below has committed serious errors resulting in miscarriage of justice.

Accordingly, this second appeal is allowed, judgment and decree dated 17.07.1985 passed by the learned court of appeal below is hereby set aside and judgment and decree dated 23.02.1995 of the learned trial court is affirmed and the suit and claim of the plaintiffs are hereby decreed.

17. However, in the aforesaid circumstances, there will be no order as to costs.

(S.N.Hussain, J.)

Patna High Court,
Patna,Dated the 1st September, 2008
N.A.F.R./harish

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